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No. 99-2047

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,

v.

RHODE ISLAND *ex rel* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL
Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici Curiae will address only the following question presented:

Whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the Nation. WLF regularly appęars in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this and other federal courts in cases involving Fifth Amendment regulatory takings claims. *See, e.g., City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on several occasions. *Amici* submit this brief in support of Petitioner and with the consent of all parties. A letter conferring blanket consent on all *amici* has been filed with the Clerk of the Court.[1]

SUMMARY OF ARGUMENT

Since its adoption by the Court in 1977, the phrase "reasonable investment-backed expectations" has bedeviled regulatory takings doctrine. Never precisely defined and invoked in a broad range of circumstances, it has proven to be neither a determinate tool of adjudication nor a reliable anchor to the constitutional text. Worse yet, inquiry into an owner's "reasonable investment backed expectations"

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

has too often proceeded unfairly. It has been routinely used to deny takings claims rather than to support them.

For these reasons, regulatory takings doctrine would be generally better off without the inquiry into "reasonable investment backed expectations." Three exceptions must be made, however, to serve the purposes of *stare decisis*. An exception occurs when an owner can be said not to have an interest amounting to "private property" on which to base a claim for just compensation. Another exists when the government attempts to restrict an owner's use of property after having given its permission for development. A catchall exception would allow the owner's "reasonable investment backed expectations" to be considered in any case where that factor supplied the ground of decision in a prior case indistinguishable from the case at bar.

None of these exceptions fairly applies here. Mr. Palazzolo's claim arises from a bona fide property interest, the government has created no vested rights, and his claim falls outside the catchall exception. An inquiry into Mr. Palazzolo's "reasonable investment backed expectations" has no part to play in deciding the first Question Presented.

ARGUMENT

The first Question Presented asks "[w]hether a regulatory takings claim is *categorically* barred whenever the enactment of the regulation predates the claimant's acquisition of the property." Pet. at i. On this point the Supreme Court of Rhode Island issued two holdings, one in the context of Mr. Palazzolo's categorical takings claim under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), Pet. App. A-16, the other under the heading of

"reasonable investment backed expectations." This second holding supplies the focus of our arguments.

With regard to Mr. Palazzolo's takings claim under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), the lower court found the factor of "reasonable investment backed expectations" "dispositive," concluding that it "need not consider the other factors of the *Penn Central* test." *Id.* Specifically, the court reasoned that when Mr. Palazzolo acquired his property "there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision." Pet. App. A-17 (citing *Good* v. *United States*, 189 F.3d 1355, 1361–62 (Fed. Cir. 1999)). Because the lower court construed the existence of the State wetlands permitting scheme at the time of property acquisition as decisive evidence of Mr. Palazzolo's "lack of reasonable investment-backed expectations," *id.*, resolving the first Question Presented may require the Court to take a fresh look at how that expression has been interpreted and applied.

I. INQUIRING INTO AN OWNER'S "REASONABLE INVESTMENT BACKED EXPECTATIONS" HAS BRED UNCERTAINTY, INCOHERENCE, AND UNFAIRNESS IN REGULATORY TAKINGS DECISIONS

The term "investment backed expectations" entered the lexicon of regulatory takings jurisprudence in *Penn Central*, 438 U.S. 104. The Court held that New York City's Landmark Preservation Law did not effect a taking by preventing the construction of a 50-story office building over Grand Central Terminal. *Id.* at 138. In characterizing its prior regulatory takings cases, the Court identified three "factors that

have particular significance." *Id.* at 124. These included "[t]he economic impact of the regulation on the claimant," "the character of the governmental action," and "the extent to which the regulation has interfered with distinct investment-backed expectations."[2] *Id.*

Rather than defining this novel formulation, the Court proceeded by analogy. It relied on the seminal case of *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) to illustrate "the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" 438 U.S. at 127. In *Mahon* the Court found that a Pennsylvania law prohibiting coal mining where it would cause the subsidence of certain houses resulted in a taking, when the coal owners had contractually reserved the right to mine under those houses. 260 U.S. at 414–15. The *Penn Central* Court suggested that the Pennsylvania law at issue in *Mahon* had impermissibly frustrated the coal owners' investment backed expectations. The law accomplished this result by making it "commercially impracticable to mine the coal," which "had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land." 438 U.S. at 127. However, the Court's discussion left open the question whether it understood the relevant "expectations" in terms of the simple fact of property

[2] The Court apparently borrowed the phrase from a law review article, *see* 438 U.S. at 128, where Professor Michelman couched the diminution of value test in terms of "whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation*." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967) (emphasis added).

ownership or in the special circumstance of an express contractual reservation of rights.

Turning to the validity of the New York City Landmark Act, the *Penn Central* Court invoked "investment backed expectations" to deny the owners' contention that they could "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." 438 U.S. at 130. In particular, the Court explained, its precedent furnished no support for the notion "that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—*i.e.*, irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a 'taking.'" *Id.* at 130 n.27.

Certain features of the "reasonable investment backed expectations" factor stand out from its debut in *Penn Central*. Like the "economic impact of the regulation on the claimant," *id.* at 124, it directs attention toward the owner's interest rather than the government's. The manner of applying the factor diminished any apparent advantage to the owners, however, by asking what expectations they lacked rather than what they possessed. Despite the Court's use of the words "investment backed expectations" as a factor having "particular significance," *id.*, it remained unclear exactly why the owners' expectations to develop the airspace above Grand Central Station were not "distinct" and "investment backed." The distinction between "discrete segments," *id.* at 130, and the "parcel as a whole," *id.* at 131, did not straightforwardly deny the owners' contention that "the airspace above the Terminal is a valuable property interest." *Id.* at 130. With these questions

unanswered, clarifying the meaning of "investment backed expectations" was left for another day.

In *Andrus* v. *Allard*, 444 U.S. 51 (1979) the Court upheld Department of the Interior regulations banning the sale of certain "avian artifacts," *id.* at 64, especially Indian relics crafted from eagle feathers. The owners claimed that the law imposed an uncompensated taking of their property. *Id.* at 67–68. In the course of declining the government's argument that the owners lacked standing merely because they had failed to allege that they acquired the artifacts before the law banning their sale became effective, *id.* at 64 n.21, the Court shed further light on its understanding of "reasonable investment backed expectations." "The timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations, but it does not erect a jurisdictional obstacle at the threshold." *Id.* Nonetheless, the Court did not directly explain how and why the "timing of acquisition" affected the owners' investment backed expectations. Nor did it clarify why such expectations were not impermissibly frustrated when the Court's refusal to grant just compensation left the owners holding a title whose only economic value lay in the dubious right to "exhibit the artifacts for an admissions charge." *Id.* at 66.

In *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), the Court concluded that the Takings Clause obligated the federal government to compensate the owners of a Hawaiian marina if it wished to open the marina to the public. *Id.* at 180. The Court described the marina as "a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by [the owners] with the consent of the Government." *Id.* at 179. While acknowledging that the government's permission

to dredge the channel "cannot 'estop' the United States," the Court emphasized that such permission "can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Id.*

Kaiser thus appears to have rested, at least in part, on the Court's judgment that the government created reasonable investment backed expectations when it granted permission to dredge Kuapa Pond and that the government's later attempt to open the pond for public use represented an impermissible interference with such expectations. Supporting this judgment is the long-settled doctrine of vested rights. This doctrine holds that an owner can claim protection from a regulatory change if he can show that he relied in good faith on the government's permission "by making substantial expenditures on his development." Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. Urb. & Contemp. L. 3, 37 (1987); *see also Herskovits* v. *Irwin*, 149 A. 195, 197 (Pa. 1930) (explaining the doctrine of vested rights).

In *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court held that no taking had resulted from provisions of the California Constitution, which prohibited the owner of a shopping center from interfering with the reasonable activities of high school students soliciting support for a United Nations resolution on his property. *Id.* at 88. The Court attempted to distinguish *Kaiser Aetna*. There, it said, the federal government's "attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's 'reasonable investment backed expectations.'" *Id.* at 84. In *Pruneyard*, on the contrary, the Court reasoned that the owners had "failed to

demonstrate that the 'right to exclude others' is so essential to the use or economic value of [his] property that the state-authorized limitation of it amounted to a 'taking.'" *Id.* at 84.

The Court's attempt to distinguish *Kaiser Aetna* clouded the meaning of reasonable investment backed expectations. *Kaiser Aetna* chiefly rested on the holding that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." 444 U.S. at 179–80. If the right to exclude is "so universally held to be a fundamental element of the property right," *id.*, one wonders why a shopping center owner's right to exclude unwanted petition-gatherers fails to qualify as a *reasonable* investment-backed expectation. Certainly both owners had substantially invested in developing their property and both had justified their takings claim based on the alleged violation of their right to exclude. Perhaps the answer lies in the breadth of the owner's asserted right. In *Kaiser Aetna* the government had tried to force the owners of a private marina to open it to the public, while in *Pruneyard* the government prevented the owner of a shopping mall from excluding only selected members of the public. Assuming that this correctly harmonizes the cases, it is still difficult to see how a reasonably prudent owner could have known in advance that one exercise of the right to exclude would be backed with the constitutional guarantee of compensation, while the other would not.

In *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), the Court determined that a Florida county had imposed a taking by appropriating "the interest accruing on an interpleader fund deposited in the registry of the county court, when

a fee . . . [was] also charged for the clerk's services in receiving the fund into the registry." *Id.* at 155–56. The concept of an owner's expectations was refined by the Court's teaching that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Id.* at 161 (citations omitted). However, the Court found that the creditors claiming the disputed interest "had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county." *Id.* The Court therefore concluded that the creditors "had a state-created property right to their respective portions of the fund." *Id.*

Webb's reaches the correct result, supported by sound reasoning. In disposing of the argument that Webb's lacked reasonable investment backed expectations, the Court relied on the distinction between "a state created property right" and "a mere unilateral expectation or an abstract need," *id.*, as a criterion for excluding owner expectations that do not deserve constitutional protection. This approach to identifying bona fide reasonable investment backed expectations is grounded on the principle that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" *Id.* (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)).

In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court found "the force" of reasonable investment backed expectations "so overwhelming," *id.* at 1005, that it alone decided the case. There the Court held that a taking had resulted from the

government's disclosure of trade secret information submitted with applications for certain pesticide registrations. *See id.* at 1011. Disclosure of data that had been submitted from 1972 to 1978, when the statute guaranteed confidentiality and thus "formed the basis of a reasonable investment-backed expectation," *id.*, would have destroyed the property value of trade secrets. Such disclosure constituted a taking. *Id.* In contrast, the Court reasoned, disclosure following 1978 statutory amendments setting forth conditions of data disclosure effected no taking, because applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality. *Id.* at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, because the Trade Secrets Act merely protected against "unauthorized" disclosure. *Id.* at 1008–10.

Monsanto thus equated "reasonable investment backed expectations" with regulatory notice. When federal regulations promised confidentiality, the Court held the government to that promise by finding that Monsanto had reasonable investment backed expectations during the period of time the regulations were in effect. When the federal regulation gave Monsanto notice that loss of confidentiality was the price of obtaining government registration, however, the Court found that the exchange of confidentiality for registration meant Monsanto lacked reasonable investment backed expectations. Once again, the analysis raises troubling questions. Why excuse the government from compensating Monsanto for the disclosure of trade secrets, merely because the law permitted the government to make such disclosures? Such a principle, if taken to the limit of its logic,

would allow the government "'by *ipse dixit* . . . [to] transform private property into public property without compensation . . . .'" *Id.* at 1012 (quoting *Webb's*, 449 U.S. at 164). As the *Monsanto* Court itself acknowledged, "'This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" *Id.* (quoting *Webb's*, 449 U.S. at 164).

In *Connolly* v. *Pension Benefit Guaranty Corp.* 475 U.S. 211 (1986), the Court turned aside a facial challenge to the "withdrawal liability," *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984), provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The Court concluded that the retroactive imposition of liability for pension plan withdrawal posed no facial violation of the Takings Clause. *Id.* at 228 (O'Connor, J., concurring). Such liability did not impermissibly frustrate reasonable investment backed expectations, the Court reasoned, because the employer had at least constructive notice that Congress might bolster the legislative scheme to accomplish its legislative aim that employees receive promised benefits. *Id.* at 226–27.

Seven years later, in *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the Court followed *Connolly* to deny a takings claim based on an as applied challenge to the same liability provisions of the MPPAA at issue in *Connolly*. *Id.* at 605. The Court held that, given the prevalence of federal regulation in the field of private pension funds, the objecting employer "could have had no reasonable expectation that it would not be faced with liability for promised benefits." *Id.* at 646. Moreover, the Court observed, the employer's reliance on a statutory limitation of liability was "misplaced, there being no reasonable

basis to expect that the legislative ceiling would never be lifted." *Id.* (footnotes omitted).

Contrast *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), where the Court determined that a federal law effected a taking when it allocated retroactive liability for health benefits to a coal company that had left the coal industry more than three decades earlier. *Id.* at 529 (plurality opinion). The Court rested that decision in part on its conclusion that the law "substantially interferes with Eastern's reasonable investment-backed expectations." *Id.* at 532. Not only did the law "reach[ ] back 30 to 50 years to impose liability," *id.*, a degree of retroactivity considered "particularly far reaching." *Id.* at 534. Such liability was "not calibrated either to Eastern's past actions or to any agreement—implicit or otherwise—by the company. Nor would the pattern of the Federal Government's involvement in the coal industry have given Eastern 'sufficient notice' that lifetime health benefits might be guaranteed to retirees several decades later." *Id.* at 536 (quoting *Connolly* v. *Pension Ben. Guar. Corp.*, 475 U.S. 211, 227 (1986).

Connolly, *Concrete Pipe*, and *Eastern Enterprises* belong together, for purposes of assessing the Court's treatment of reasonable investment backed expectations. *Connolly* is perhaps best explained as a facial challenge case, where the takings claim predictably failed to invalidate the statute. *See* 475 U.S. at 228 (O'Connor, J., concurring). *Concrete Pipe* and *Eastern Enterprises* present more difficult questions. *Concrete Pipe* relied on *Connolly* to hold that constructive notice sufficiently diminished an owner's reasonable investment backed expectations to defeat a takings claim. 508 U.S. at 646. Yet neither case adequately explained how the passage of one regulatory scheme

furnishes sufficient notice, whether constructive or actual, to defeat a takings claim based on changes (sometimes substantial changes) to that scheme.

Eastern Enterprises is in some tension with *Concrete Pipe and Connolly*. There the Court found that the owners had reasonable investment backed expectations in avoiding liability, despite the owners' decades-long experience paying out certain benefits to coal workers. 524 U.S. at 532. Distinguishing the cases appears to turn on the length of retroactive effect, *see id.* at 534, and the degree of "calibration," measured as the marginal change in out-of-pocket liability relative to a claimant's "past actions or to any agreement." *Id.* at 536. However, neither of these facts fits particularly well within the category of reasonable investment backed expectations. Retroactivity seems more a problem of due process than regulatory takings, as Justice Kennedy perceived, 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part), and the marginal change in out-of-pocket costs fits most snugly within the independent inquiry into a regulation's "economic impact." *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

Of particular significance for the Question Presented is the Court's decision in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987). There the Court found a taking where a state agency conditioned its grant of permission to rebuild a house on the owner's "transfer to the public of an easement across their beachfront property." *Id.* at 827. Because "the permit condition [failed to] serve[ ] the same governmental purpose as the development ban," *id.* at 837 (a relationship labeled the "essential nexus," *id.*) the Court understood it as "the obtaining of an easement to serve some valid governmental purpose, but without just compensation." *Id.* As such, the

condition was invalid without just compensation. *Id.* at 841–42.

Writing in dissent, Justice Brennan charged that the owners "can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean." *Id.* at 857 (Brennan, J., dissenting). He based this contention on two reasons. First, he asserted that both the California Constitution and the state code "clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights . . . ." *Id.* at 858. Second, Justice Brennan turned to *Ruckelshaus* v. *Monsanto*, 467 U.S. 986 (1984), from which he concluded that the owners lacked reasonable investment backed expectations because they "were on notice that new developments would be approved only if provisions were made for lateral beach access." 483 U.S. at 860 (quoting *Monsanto*, 467 U.S. at 1005).

The Court sharply disagreed. It understood *Monsanto* not as standing for the "peculiar proposition that a unilateral claim of entitlement by the government can alter property rights," but rather as a case where an owner had sacrificed certain property rights to obtain a "valuable Government benefit." *Id.* at 833 n.2. Because the Court considered that "the right to build on one's own property . . . cannot remotely be described as a 'government benefit,' it concluded that "the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary 'exchange' . . . that we found to have occurred in *Monsanto*. *Id.* (quoting *Monsanto*, 467 U.S. at 1007). The Court added that the owners' Fifth Amendment right to compensation is unaffected by the fact that they acquired the land after the coastal

land use regulations were being enforced. "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*

Nollan contributed important elements to the doctrine of reasonable investment-backed expectations. The Court directly refuted Justice Brennan's attempt to push *Monsanto* to the limit of its logic. Notice of a regulatory permit scheme does not, the Court said, automatically destroy an owner's reasonable investment backed expectations in developing his property. The Court also declined to characterize the acquisition of property after the enactment of a regulation as a bar to the owner's Fifth Amendment claim. *Nollan* thus furnishes compelling support for resolving the first Question Presented in favor of Mr. Palazzolo.

In *Hodel* v. *Irving*, 481 U.S. 704 (1987), the Court found that certain members of the Ogala Sioux Tribe had suffered a taking from a federal law that abolished the right to transfer small fractionated interests in reservation land by intestacy or devise. *Id.* at 718. However, the Court doubted whether the owners' descendants had "'investment-backed expectations' in passing on the property." *Id.* at 715. Fueling its doubts, the Court said, was the would-be beneficiaries failure to "point to any specific investment-backed expectations beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation." *Id.* Evidently the Court placed great importance on the word "investment" and found that the absence of investment demonstrated the lack of "reasonable investment-backed expectations."

Because the Court ultimately decided *Irving* based on its determination that the "character of the Government regulation here is extraordinary," *id.* at 716, its discussion of investment backed expectations may be regarded as dicta, though no less troubling for that. Denying the takings claim of an owner based, even in part, on the ground that the property was acquired by devise or intestacy rather than purchase, has the effect of excluding such property from Takings Clause protection. And the Court simply failed to explain why property acquired through inheritance carries with it less potent constitutional rights than property acquired otherwise.

Lucas v. *South Carolina Coastal Council*, though not strictly speaking a "reasonable investment backed expectations" case, contributed additional detail to that doctrine. There the Court held that a state statute barring the construction of "occupiable improvements," *id.* at 1009, seaward of a particular baseline effected a taking when it deprived the owner of two beachfront lots of "all economically beneficial use" of his property. *Id.* at 1027. In contrast with the admittedly "ad hoc, factual inquiries," *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978), the Court in *Lucas* based its holding on a "categorical," *id.* at 1015, rule:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

Id. at 1027.

The issue of reasonable expectations arose indirectly, during the Court's attempt to address the

"denominator problem," John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1537 (1994), meaning the problem of identifying "the 'property interest' against which the loss of value is to be measured." 505 U.S. at 1016 n.7. The Court noted that a solution might be suggested by "how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.*

Justice Stevens dissented. Criticizing the Court's holding as "wholly arbitrary," he argued that under the categorical rule "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the and's full value." *Id.* at 1064 (Stevens, J., dissenting). The Court disagreed with that description of the rule's effect. "This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." *Id.* at 1019 n.8. It acknowledged that "in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full." *Id.* However, it pointed out that the traditional *Penn Central* factors would apply to a landowner whose loss "is one step short of complete." *Id.* For such owners, "'[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Id.* (quoting *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)).

Lucas employed the concept of "reasonable investment backed expectations" rather loosely. When referring to those expectations "shaped by the State's law of property," *id.* at 1016 n.7, it used the term "reasonable expectations." *Id.* When referring to the elements of *Penn Central*, it used the older terminology "distinct investment-backed expectations." *Id.* at 1019 n.8. The Court did not explain whether it considered the "expectations" tied to State law, which it found relevant to defining the denominator in a takings claim, synonymous with the "expectations" relevant as one factor in a multi-factor balancing test for deciding non-categorical regulatory takings claims. Nor did it explain what relationship (if any) that it perceived between these varied "expectations."

This review of the decisions suggests that inquiring into an owner's "reasonable investment backed expectations" has bred uncertainty, incoherence, and unfairness. The uncertainties we have already limned. The incoherence of decisions applying "reasonable investment backed expectations" may be attributed to its conceptual emptiness. It has been used to describe air rights that fail judicial scrutiny, *Penn Central*, 438 U.S. 104 (1978), and water rights that survive it, *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); a prevailing right to exclude, *id.*; and a failing right to exclude, *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980); regulatory notice that defeats a takings claim, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), and regulatory notices that fail to defeat a takings claim, *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987); *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). No wonder one commentator has concluded, "The Court is confused about the meaning of this term, federal and state courts divide on how to apply it, and its role

in taking law remains a puzzle." Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. L. 215 (1995).

Worse still, inquiry into an owner's "reasonable investment backed expectations" has too often proceeded unfairly. "The Court has concentrated almost entirely on deciding when investment-backed expectations do not exist rather than on deciding when they can provide a basis for a taking claim." *Id.* at 225. It is a strange rule of constitutional law that deliberately honors a constitutional right more in the breach than in the observance. Suppose that First Amendment doctrine included a rule excusing content discrimination when the government could show that the speaker had no reasonable expectation that his speech would influence public policy. Just as this rule would clearly turn the words of the First Amendment on their head by privileging government censorship over the freedom to speak, so too routinely deploying "reasonable investment backed expectations" as a justification for denying takings claims turns the Fifth Amendment upside-down by privileging confiscation, or the substantial loss of property, over compensation. This flies in the face of the Court's teaching: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

II. THE PHRASE "REASONABLE INVESTMENT BACKED EXPECTATIONS" BEARS NO CLOSE RELATION TO THE LANGUAGE OF THE FIFTH AMENDMENT TAKINGS CLAUSE

Apart from the uncertainty, incoherence, and unfairness it has bred, inquiry into an owner's

"reasonable investment backed expectations" is also flawed because it is not anchored in the text of the Takings Clause. Correctly evaluating the place of "reasonable investment backed expectations" in regulatory takings doctrine "begin[s] with direct reference to the language of the Fifth Amendment." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987); *see also Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 142 (Rehnquist, J., dissenting) (arguing for "a closer scrutiny" of the language of the Fifth Amendment).

Those words say, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984) all but eliminated "public use" as an issue for adjudication. *Id.* at 241. Interpreting the Takings Clause thus centers on the meaning of "private property," "taken," and "just compensation." From its understanding of these key terms, "[t]he Court recognizes three distinct issues implicated by a takings claim: whether the interest asserted by the plaintiff is property, whether the government has taken that property, and whether the plaintiff has been denied just compensation for the taking." *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 172 (1998) (Souter, J., dissenting). Only the first two issues are relevant in this case.

The phrase "reasonable investment backed expectations" bears no close relationship with the words chosen by the authors of the Fifth Amendment. *Cf.* Mandelker, 27 Urb. L. at 225 ("A major problem in the decisions may be the choice of terms to describe this taking element."). The word "expectations" is both over- and underinclusive. It could be said to embrace a "unilateral expectation" or "an abstract need." *Webb's Fabulous Pharmacies, Inc.*

v. *Beckwith*, 449 U.S. 155 (1980). The classic example lies with the owner who purchases 100 acres of agricultural land on the edge of town. His "expectation" that the property will be eventually rezoned for more intensive and valuable uses could not be vindicated, were he to bring a takings claim against the town, because his "expectation" does not qualify as "private property." At the other end of the spectrum, the category of "expectations" has been drawn narrowly enough to exclude property interests independently protected under State law. *See, e.g.*, *Penn Central*, 438 U.S. at 130 n.27.

Choosing the word "expectation" also raises the question whether these expectations are subjective or objective, to be tested according to proof of a particular owner's actual expectations regarding property or according to a court's independent assessment. With the substitution of "reasonable" for "distinct" in the formulation, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979) the Court implicitly settled this question early on in favor of objectivity. But the addition of that adjective has not removed the subjectivity inherent in the word it modifies. And it is the inherent subjectivity of the word "expectations," not the words "taken" or "private property," that accounts for much of the uncertainty and incoherence we have described. These faults belong to the judicial test used to interpret the Fifth Amendment, not to the language of the amendment itself.

It remains unclear why only "investment backed" expectations deserve constitutional protection when the Constitution uses the words "private property." What then about property acquired through gift, devise, or intestacy? *Hodel* v. *Irving*, 481 U.S. 704 (1987) highlighted the potential for mischief when

it suggested, albeit in dicta, that property not acquired through investment may not qualify for Fifth Amendment protection. *See id.* at 715. *Irving* illustrates how the judicial test of "reasonable investment backed expectations" might be used to substantially reduce the range of property interests given constitutional protection, despite the clear language of the Fifth Amendment securing compensation for the taking of "private property."

III. WITH THREE EXCEPTIONS "INVESTMENT-BACKED EXPECTATIONS" OUGHT TO BE ABANDONED AS A FACTOR IN REGULATORY TAKINGS CASES

A review of the Court's decisions and an analysis of "reasonable investment backed expectations" in light of the text of the Fifth Amendment reveals at least three critical flaws. First, "reasonable investment backed expectations" is not a phrase closely anchored to the constitutional text. Decisions applying it can be expected to wander from constitutional first principles.

Second, inquiring into an owner's "reasonable investment backed expectations" has produced a pattern of decisions that is uncertain and incoherent. In a word, the formulation is indeterminate. Announcing that it applies says little if anything about how and why the case will be decided. Contrary to the rule of law, the meaning of "reasonable investment backed expectations," as applied in a particular case, remains unclear until it receives its limited definition, "good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Such indeterminacy leaves takings claims vulnerable to manipulation, despite the Court's affirmation that "[w]e view the Fifth Amendment's Property Clause to be more than a

pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 841 (1987); *see Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12. (1992).

Third, the application of "reasonable investment backed expectations" has bred unfairness. One should not be terribly surprised by this, given that *Penn Central* itself was "insensitive to taking clause values." David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888-1986, at 521 n.104 (1990). Yet the unfairness of applying an analytical tool principally to deny takings claims is fundamentally inconsistent with a constitutional provision whose aim is "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

"Reasonable investment backed expectations" ought to be generally abandoned as a factor in regulatory takings cases. As bold as it seems, this proposal would not require the Court to overrule a single precedent because the inquiry into "reasonable investment backed expectations," though a familiar part of regulatory takings cases, has rarely served as the ground of decision. Carving out three exceptions would amply serve the purposes of *stare decisis*. *Cf. Itel Containers Int'l Corp.* v *Huddleston*, 507 U.S. 60, 78–79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (recommending the abandonment of negative Commerce Clause doctrine, except as necessary to preserve reliance interests).

First, the phrase performs a useful service by alerting takings claimants to the requirement that any takings claim must be grounded in "private property" independently created under State or federal substantive law. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980).

Second, the phrase "reasonable investment backed expectations" accurately captures the common law principle of "vested rights." *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979). "A similar reliance rule is appropriate in deciding when investment-backed expectations are reasonable and entitled to protection under the Taking Clause." Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. L. 215, 237 (1995).

Third, "reasonable investment backed expectations" may supply the ground of decision in any other case where that factor supplied the ground of decision in a case indistinguishable from the case at bar. *Cf. Itel Containers Int'l Corp.* v *Huddleston*, 507 U.S. 60, 78–79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (allowing for negative Commerce Clause challenges "against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court"). The principal case that appears to fit this exception is *Monsanto*. Because the holding in *Monsanto* has been sharply limited, *see Nollan* v. *California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987), the reach of this exception is correspondingly limited, as well.

IV. MR. PALAZZOLO'S "REASONABLE INVESTMENT BACKED EXPECTATIONS HAVE NO BEARING ON THE FIRST QUESTION PRESENTED

Contrary to the decision below, *see* Pet. App. A-17, Mr. Palazzolo's takings claim cannot be properly

analyzed according to his reasonable investment backed expectations. His claim fits none of the narrow situations we have described where an owner's reasonable investment backed expectations form a correct part of the constitutional analysis. There is no doubt that Mr. Palazzolo has asserted a bona fide property interest. Fee simple title to real property, *id.* at A-2–A-3, is "an estate with a rich tradition of protection at common law." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *see also* 2 William Blackstone, Commentaries on the Laws of England 104–05 (1766) (Legal Classics Library ed., 1983) (describing the rights of a tenant in fee simple). Rhode Island has conferred no vested interest on Mr. Palazzolo, because the State has not wavered from its decision to deny him a development permit. *See* Pet. 2–3. And Mr. Palazzolo's claim falls outside the catchall category. As the Court has held, "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'" *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987). "Reasonable investment backed expectations" thus have no legitimate role to play in deciding whether Mr. Palazzolo's takings claim is categorically barred, merely because he acquired the property after the State wetlands regulation was adopted.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Rhode Island should be reversed.

Respectfully submitted,

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